IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-985

AMERICAN THEATRE CORPORATION and
RICHARD OTTIS BERRY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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NO. _____

AMERICAN THEATRE CORPORATION and
RICHARD OTTIS BERRY,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above case on October 14, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is as yet unreported; a copy of said opinion is set forth in Appendix "A" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 14, 1975. A Petition for Rehearing was filed and received by the Court on October 29, 1975, one day beyond the time deadline prescribed by *Rule 40(a)* of the *Federal Rules of Appellate Procedure*. Upon good cause shown, however, the Court of Appeals directed that the untimely Petition for Rehearing be filed and heard on its merits. Said action of the Court of Appeals is reflected in an Order of November 10, 1975, a copy of which is set forth in Appendix "B" hereto.

On December 12, 1975, the Petition for Rehearing was denied in an Order, a copy of which is set forth in Appendix "C" hereto. On that same date the attendant Petition for Rehearing En Banc was denied by a vote of five to three. Judge Lay, joined by Judges Bright and Henley, dissented from the denial of the Petition for Rehearing En Banc in an opinion, a copy of which is set forth as Appendix "D" hereto.

This Petition for Writ of Certiorari is being filed within thirty days of the December 12, 1975 action of the United States Court of Appeals for the Eighth Circuit. This Court's jurisdiction is invoked under *Title 28 United States Code* § *1254(1)*.

QUESTIONS PRESENTED

1. Whether an appellate court, in performing the duty enunciated in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself review the materials charged as obscene in order to adequately fulfill that independent appellate judicial duty?

2. Whether either film upon which the convictions below are predicated are protected expression under the *First Amendment* to the *United States Constitution?*

3. Whether the taxing of costs of a criminal prosecution upon a defendant constitutes an impermissible burden upon rights guaranteed by the *Fifth* and *Sixth Amendments* to the *United States Constitution?*

4. Whether the minimum constitutional requirements of *scienter* in obscenity prosecutions, as set forth in *Hamling v. United States*, 418 U.S. 87 (1974), were met in the trial below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First Amendment* are:

"Congress shall make no law . . . abridging freedom of speech, or of the press . . ."

The pertinent provisions of the *Fifth Amendment* are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The pertinent provisions of the *Sixth Amendment* are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . "

The pertinent provisions of *Title 28 United States Code* §*1918(b)* provide:

"Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution."

STATEMENT

The Petitioners, one corporation and one individual, were tried before a Court and jury in the United States District Court for the District of Nebraska. Said Court and jury found Petitioners guilty of knowingly transporting obscene motion picture films in interstate commerce in violation of *Title 18 United States Code* §*1462*. The convictions were predicated upon the interstate carriage of motion picture films entitled "Champagne Party" and "The Club," both films being contained in a single shipment moved by a common carrier.

Richard Ottis Berry was sentenced to five years imprisonment on the condition that he serve weekends for a period of six months and be placed on probation for a period of four years and six months immediately following the period of weekend confinement. American Theatre Corporation was sentenced to pay a fine of $5,000.00 as well as the costs of the prosecution to be taxed by the Government.

Upon appeal, the United States Court of Appeals for the Sixth Circuit affirmed the conviction in a judgment and opinion for which review is here sought. Although determining that the films charged were in fact obscene, the Court did not view said films, citing as support for this procedure the case of *United States v. Marks*, 520 F.2d 913 (CA 6 1975). The judgment and opinion in *Marks, supra*, upon which the Court below relied, is currently before this Court for review in a Petition for Writ of Certiorari styled *Marks, et al. v. United States*, No. 75-708, filed November 13, 1975.

The Court below subsequently denied a Petition for Rehearing and a Petition for Rehearing En Banc. Judge Lay, joined by Judges Bright and Henley, dissented from the denial of rehearing en banc in an opinion urging the necessity of an independent appellate review of materials upon which obscenity prosecutions rest.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON THE ISSUE OF WHETHER APPELLATE COURTS, IN REVIEWING OBSCENITY CONVICTIONS, MUST INDEPENDENTLY REVIEW THE MATERIALS CHARGED AS OBSCENE.

Upon appeal, the Court of Appeals below was called upon to independently determine the alleged obscenity of the films upon which the convictions of Petitioners are predicated. The

Court of Appeals declined to view the films, following a practice occasioned in *United States v. Marks*, 520 F.2d 913 (CA 6 1975). In this regard, the Court below noted:

"Counsel stipulated that these films:

> ***depicted adult men and women participating in various sex acts including sexual intercourse with penetration, fellatio, cunnilingus, and masturbation. These acts were committed heterosexually and homosexually between couples and in groups. On several occasions, semen was ejaculated and then spread on the women's body.[2]

[2] In light of counsel's stipulation on the contents of these films and in light of the expert testimony as to the lack of value in these films, the Court based its decision on the record presented to it and did not view the films, a practice followed recently in *United States v. Stanley Marks, et al.*, Nos. 74-1531 – 74-1535 (6th Cir. July 30, 1975)."

It must first of all be noted that the decision in *Marks, supra*, upon which the Court below relied, is now before this Court for review in a Petition for Writ of Certiorari entitled *Marks, et al. v. United States*, No. 75-708, filed November 13, 1975. That Petition for Writ of Certiorari expressly questions the failure of the Court of Appeals to independently view the materials.

Further, the practice in *Marks, supra*, and in the Court below is in direct conflict with the practice followed in the United States Court of Appeals for the Fifth Circuit. (Taken from *Marks et al. v. United States*, filed in U.S. Supreme Court on 11/13/75 – pp. 13-18.)

The Fifth Circuit, in *Clique v. United States*, 514 F.2d 923 (CA 5 1975), spoke on this issue in an unanimous opinion authored by Judge Goldberg. *Clicque* involved an obscenity conviction founded upon a plea of guilty. Despite the guilty plea, the Court noted that the judiciary retained a duty of independent review:

> "We believe that Clicque's First Amendment rights may have been infringed and that he may have been sent to jail for protected writing. We conclude that in this constitutionally sensitive area, the convicting court was under a constitutional duty to assure itself of the unprotected nature of Clicque's writing." 514 F.2d, at 925-926.

On the status of that independent review at the appellate level, the Court noted:

> "The rule that a guilty plea does not excuse the court from reviewing the actual materials on which the plea is based applied with equal force to the district judge as it does to the appellate judge. The rule requires an 'independent assessment' of the facts before a conviction may be upheld in order to see whether the material is constitutionally protected." *Id.*, at 927.

The same point was later made as follows:

> "The requirement for the district court would seem to be the same as that for the appellate court. It must look at the materials and assess them according to the criteria given us by the Supreme Court." *Id.*, at 928 n.5.

There is thus a clear conflict among the Courts of Appeals on the issue of the necessity of an independent appellate review of materials charged as obscene. This Court has spoken on the issue several times, always concluding that an independent review is necessary.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter.

This Court reversed in a judgment announced by Mr. Justice Harlan. The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue in a lower court:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and laws, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L. Rev 5, 114-115 (1960), we see no need of remanding the case for

> initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determinations of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc. v. Christenberry (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra,* stated:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 U.S., at 497-498, 1 L.Ed.2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' *Id.*, at 498, 1 L.Ed.2d at 1514; see Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 8 L.Ed.2d 639, 647, 82 S.Ct. 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court only recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This same course of independent review has been followed by this Court in several cases. *See, e.g., Kois v. Wisconsin*, 408 U.S. 229 (1972); *Hamling v. United States*, 418 U.S. 87 (1974). Thus, though the Courts of Appeal are in conflict, this Court has apparently enunciated the duty of independent appellate review of materials upon which obscenity convictions are predicated. Such considerations aside, however, the conflict of the decision below with the decision of the United States Court of Appeals for the Fifth Circuit in *Clique, supra*, is clearly in need of a resolution which only this Court can provide.

II.

THE MOTION PICTURE FILMS UPON WHICH THE CONVICTIONS BELOW REST MAY NOT BE HELD OBSCENE SINCE THEY CONSTITUTE EXPRESSION PROTECTED UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court is respectfully called upon to perform the duty of appellate judicial review previously expounded upon. In so doing, the Court is urged to independently review each film in its entirety to determine the issue of obscenity *vel non*.

> In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities,

including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts,* 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States,* 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry,* 388 U.S. 448 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio,* 388 U.S. 453 (1967) ("Orgy Club"); *Hoyt v. Minnesota* 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer")'

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women; films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal areas; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California,* 400 U.S. 922 (1970).

(These 2 Paragraphs are from the Sanders cert. petition, pg. 13)

When the motion picture films upon which the convictions below rest are considered as a whole and judged

against press materials of a similar or more explicit nature heretofore determined by this Court not to be obscene, the conclusion is inescapable that the films constitute protected speech under the *First Amendment* to the *Constitution of the United States.*

III.

THE TAXING OF THE COSTS OF PROSECUTION TO A DEFENDANT IN A CRIMINAL PROCEEDING IS AN UNCONSTITUTIONAL BURDEN UPON AND AN ABRIDGEMENT OF THAT DEFENDANT'S RIGHTS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner American Theatre Corporation in this case was sentenced to pay a fine in the amount of $5,000.00, the maximum allowable fine authorized by statute. *See Title 18 United States Code §1462.* In addition to that fine, the Petitioner was ordered to pay the costs of prosecution as taxed by the Government. The costs were ordered taxed pursuant to the authority of *Title 28 United States Code §1918(b)* which provides:

> "Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution."

The imposition of costs pursuant to *Title 28 United States Code §1918(b)* is here challenged as an unconstitutional burden upon a criminal defendant's rights to trial and trial by jury. To impose the costs of prosecution upon an unsuccessful criminal defendant impermissibly

burdens that defendant's *Sixth Amendment* right to trial by facing him with an additional punishment measured by the costs incurred in overcoming his defenses. Thus every effort put up in defense raises the spectre of further punishment if that defense is unsuccessful. By exercising the constitutionally guaranteed right to trial by jury, a criminal defendant exposes himself to an additional punishment – the costs of that trial – not faced by those defendants who waive their rights by pleading guilty.

The landmark case in the area of impermissible burdens on constitutional rights is *United States v. Jackson*, 390 U.S. 570 (1968). In *Jackson*, this Court declared unconstitutional that portion of the Federal Kidnapping Act which authorized an additional punishment – the death penalty – for those defendants who asserted their right to contest their guilt before a jury.

In striking down the provision, it was here noted:

> "Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the *Fifth Amendment* right not to plead guilty and to deter exercise of the *Sixth Amendment* right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

* * * * * * * *

> "Whatever might be said of Congress objectives they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. *United States v. Robel*, 389 US 258, 19 L ed 2d 508, 88 S Ct 419; *Shelton v. Tucker*, 364 US 479, 488-489, 5 L ed 2d 231, 237-238, 81 S Ct 247. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive." 390 U.S., at 581-582.

This Court further noted that a provision need not actually *coerce* the abandonment of a constitutional right to be impermissible. It is enough if the provision or practice merely *encourages* the waiver or abandonment of such rights:

> "It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." 390 U.S., at 582.

The imposition of the costs of prosecution upon a criminal defendant is clearly encompassed in the *Jackson* rationale. It encourages the waiver of "the *Fifth Amendment* right not to plead guilty and the *Sixth Amendment* right to demand a jury trial." 390 U.S., at 581. It discourages the assertion of those constitutional rights by confronting all those who assert them with the possibility of further punishment not facing those who waive the rights.

Also relevant in this regard are the words of this Court in *Griffin v. California*, 380 U.S. 609 (1965). The Court in *Griffin* held that prosecutorial comment upon a defendant's silence constituted an impermissible burden upon his right to remain silent. In so holding, it was stated:

> "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S., at 614.

No other words can better describe the imposition of prosecutorial costs upon a criminal defendant. It is a penalty imposed by courts for exercising the constitutional rights to trial and to trial by a jury; it cuts down of the exercise of those rights by making their assertion costly.

Furthermore, the imposition of costs makes the total punishment imposed on American Theatre Corporation in this case in excess of the maximum of $5,000 allowed by *18 U.S.C. §1462.*

Chief Justice Marshall, over 150 years ago, articulated the principle that the delineation of criminal punishments is within the legislative domain:

> "[T]he power of punishment is vested in the legislative . . . department. It is the legislative . . . which is to define the crime and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 93 (1820).

The continuing validity of that proposition was underscored by the Supreme Court in *Bell v. United States.* 349 U.S. 81 (1955):

> "The punishment appropriate for diverse federal offenses is a matter of discretion for Congress, subject only to Constitutional limitations, more particularly the *Eighth Amendment.*" 349 U.S., at 82.

Congress here has exercised this power by prescribing a maximum fine of $5,000 for each violation of *18 U.S.C. § 1462.* Under the sentence imposed below, however, the American Theatre Corporation must pay more than this statutory maximum. The amount of the excess, furthermore, will include expert witness fees incurred by the government here even though no expert testimony is required in federal obscenity prosecutions. See *Hamling v. United States,* 418 U.S. 87 (1974). In this respect, the aggregate punishment is placed in the hands of the prosecutor contrary to the dictates of *Wiltberger, supra,* and *Bell, supra,* and in violation of the Congressional mandate contained in *18 U.S.C. §1462.*

In summary the imposition of costs is a burden upon the exercise of constitutional rights and an impermissible intrusion upon the legislative function of delineating permissible punishments.

IV.

THE EVIDENCE IN THE RECORD IS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH THE ELEMENT OF SCIENTER SO AS TO MEET THE MINIMUM CONSTITUTIONAL STANDARDS FOR SUCH SCIENTER ENUNCIATED IN *HAMLING V. UNITED STATES*, 418 U.S. 87 (1974)

Petitioners respectfully submit that the record is completely devoid of any evidence sufficient to predicate a constitutionally acceptable finding of *scienter*. Any formulation of the principles governing the issue of *scienter* in the area of *First Amendment* litigation must originate with the decision of this Court in *Roth v. United States*, 354 U.S. 476 (1957).

In deciding *Roth v. United States*, the Court stated that the obscenity statutes there involved and as construed were not too ambiguous to define a criminal offense. Each of the cases cited to support this ruling, however, stressed the fact that the respective statute involved was directed only at those with guilty knowledge or intent. *See, United States v. Petrillo*, 332 U.S. 1, 7-8; *United States v. Harris*, 347 U.S. 612, 624 n. 15; *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340; *United States v. Ragen*, 314 U.S. 513, 523-524; *United States v. Wurzbach*, 280 U.S. 396; *Hygrade Provisions Co. v. Sherman*, 266 U.S. 497; *Fox v. State of Washington*, 236 U.S. 273; and *Nash v. United States*, 229 U.S. 373.

The constitutional validity of the obscenity statutes involved in *Roth* rested, therefore, insignificant measure upon

the understanding that the statutes were not intended to apply to those who distribute material dealing with sex, but only to those who had knowledge that the particular material was of obscene character and content.

The issue finally was resolved by the decision in *Smith v. California*, 361 U.S. 147 (1959). It was there held that the strict liability feature of the California obscenity ordinance there involved was seriously restricting the circulation of books which are not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold". 361 U.S. at 152. The tendency of the California ordinance, the Supreme Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. at 160.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court stated:

> "The Constitution requires proof of *scienter* to avoid the hazard of self- censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the State with respect to the "stringent *scienter* requirement" and "vital element of *scienter*", 383 U.S. at 507, 510 n. 5, the Court specifically noted that a paranthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of *scienter*." 383 U.S. at 510 n. 9.

The most recent decision of this Court on the minimum *Scienter* necessary to satisfy the requirements of Due Process and the *First Amendment* in an obscenity prosecution is *Hamling v. United States*, 418 U.S. 87 (1974). There, the Court states:

> "[W]e think the 'knowingly' language of 18 U.S.C. §1462 and the instructions given by the district court in this case satisfy the constitutional requirements of scienter. It is constitutionally sufficient that *the prosecution show that a defendant had knowledge of the contents of the material he distributes, and he knew the character and nature of the materials."* 418 U.S., at 123 (emphasis added).

Thus the test, as enunciated in *Hamling*, is whether the prosecution shows that a defendant "had knowledge of the contents of the material he distributed, and he knew the character and nature of the materials." There can be no question but that the record below is completely devoid of any such evidence.

The only evidence in the record below which is even remotely related to the element of *scienter* is found in the testimony of Mr. Elei G. Florence and Mr. Frederick L. Hasenpflug.

Mr. Hasenpflug testified that he was hired by the American Theatre Corporation in October of 1973. He testified that he was notified of his hiring by Richard Berry, whom he looked to as the manager of the theatre. Mr. Hasenpflug testified that he forwarded his time records to Mr. Berry and that his paycheck was sometimes handed to him by Mr. Berry. Mr. Hasenpflug further testified that Mr. Berry opened the theatre each morning and prepared the cash register for the day's business.

Mr. Hasenpflug testified that he sometimes received shipments of film when delivered by a common carrier. He further testified, however, that he was in no way involved in ordering the films. Most significantly, he testified that he did not know who decided what films would be shown and when they would be shown.

Mr. Florence testified, that on or about the date of the alleged offense herein, he was employed by the American Theatre Corporation. He testified that he was employed as a projectionist at the Pussycat Theatre in Omaha, Nebraska. Mr. Florence further testified that Mr. Berry had instructed him to run the film "Champagne Party". As to the other film which was allegedly shipped in the same box with "Champagne Party", Mr. Florence testified that said film, "The Club" was never shown.

The testimony of Mr. Florence as it relates to the issue of *scienter* can only be characterized as exculpating:

> "Q. Is it correct to say that you have never shown the movie called "The Club"? A. That is correct.
>
> Q. In the Pussycat Theatre and in Omaha, Nebraska? A. That is correct.
>
> Q. And do you know whether it had ever been shown in the Pussycat Theatre in Omaha prior to that time or since that time? A. Not for as long as I was there.
>
> Q. *Did you find that Mr. Berry would sit down and watch these films as they were being shown*? A. *Not to my knowledge.*
>
> *Q. Did Mr. Berry see Champagne Party*? A. *Not to my knowledge*". (T. 51 emphasis added).

The record is completely devoid of any other evidence relative to the knowledge of Mr. Berry as to the character and the contents of the films charged as obscene in these proceedings. The evidence which is present, as enumerated above, demonstrates a clear lack of such knowledge on Mr. Berry's part.

Even if it may be assumed, despite the absence of any evidence in the record, that Mr. Berry viewed the films herein after their arrival in Omaha, no assumption could possibly be made as to his knowledge of the character and contents of the films prior to or at the time of their shipment in interstate commerce. The crime charged herein is, of course, shipment of obscene materials in interstate commerce, in violation of *18 U.S.C.* § 1462. The element of *scienter* therefore necessarily relates to the knowledge of the defendants prior to or at the time of the shipment which constitutes the crime. The conclusion is inescapable that, whatever knowledge Mr. Berry possessed with respect to the films exhibited at the Pussycat Theatre, he had no knowledge of the contents or character prior to or at the time of their shipment in interstate commerce.

In summary, it can be seen that the record is completely devoid of any evidence whatsoever establishing the element of *scienter.* There is no evidence that Mr. Berry was aware of the nature, character, or contents of the materials prior to or at the time of their shipment in interstate commerce. Indeed, the only evidence on the record is that Mr. Berry was unaware of the nature, content, and character of the materials even after their arrival in Omaha, since he never viewed the films exhibited at the Theatre. Knowledge of the nature, character and content of materials charged as obscene was

delineated as the minimum acceptable constitutional standard of *scienter* in *Hamling v. United States, supra.* In the absence of any proof establishing such *scienter,* the convictions below must be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 75–1143

United States of America,
Appellee,

v.

American Theater Corporation and Richard Ottis Berry,
Appellants.

Appeal from the United States District Court for the District of Nebraska.

Submitted: September 12, 1975
Filed: October 14, 1975

Before MATTHES, Senior Circuit Judge, and HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

American Theater Corporation and Richard Berry appeal from their conviction by a jury of knowingly transporting by common carrier in interstate commerce two obscene

motion pictures entitled "Champagne Party" and "(X) The Club (X)" in violation of 18 U.S.C. §1462.[1] we affirm.

Three issues are raised on appeal. American Theater and Berry contend that neither film is obscene as a matter of law and that both are protected expression under the First Amendment. Berry asserts that there is insufficient evidence to show that he had knowledge of the contents of the films and, therefore, his conviction must be reversed as the scienter requirements set forth in *Hamling v. United States*, 418 U.S. 87 (1974), have not been met. American Theater contends that the taxing of the costs of prosecution upon it after conviction is an unconstitutional burden and an infringement of its rights guaranteed by the Fifth and Sixth Amendments.

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[1] 18 U.S.C. §1462 states:

* * * Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce –

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character; or

* * * * * * * *

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful –

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

OBSCENITY ISSUE

Under the teaching of *Miller v. California*, 413 U.S. 15 (1973) and *Jenkins v. Georgia*, 418 U.S. 153 (1974), an appellate court has the obligation to independently determine whether the questioned material is obscene under the following standards:

> * * * (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. * * *

Miller v. California, supra at 24.

After a careful review of the record, we are convinced that "Champagne Party" and "(X) The Club (X)" are obscene within the meaning of the above cited cases.

Counsel stipulated that these films:

> * * * depicted adult men and women participating in various sex acts including sexual intercourse with penetration, fellatio, cunnilingus, and masturbation. These acts were committed heterosexually and homosexually between couples and in groups. On several occasions, semen was ejaculated and then spread on the women's body.[2]

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[2] In light of counsels' stipulation of the contents of these films and in light of the expert testimony as to the lack of value in these films, the Court based its decision on the record presented to it and did not view the films, a practice followed recently in *United States v. Stanley Marks, et al.*, Nos. 74-1531–74-1535 (6th Cir. July 30, 1975).

We find little in the record to support the appellants' contention that notwithstanding the conduct these films depict, they have "serious literary, artistic, political, or scientific value." While the appellants' expert testimony indicated that they have some such value, the government's expert testified to the contrary. The jury accepted the expert testimony of the latter and we independently concur with that opinion.[3]

THE SCIENTER REQUIREMENT

Appellant Berry contends that there is insufficient evidence to satisfy the scienter requirement enunciated in *Hamling v. United States, supra:*

> * * * It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution.

Id. at 123–124. *Accord, United States v. Friedman,* 506 F.2d 511, 516–517 (8th Cir. 1974).

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[3] We note that the appellants did not object to the jury instructions given, and we find them to have accurately and fairly set forth the standards enumerated in *Miller v. California,* 413 U.S. 15, 24 (1973), set forth above.

The following evidence was presented at trial from which the jury could find that Berry had knowledge of the contents, nature and character of these films: (1) Berry was listed as the registered agent of American Theater Corporation in its Nebraska Articles of Incorporation; (2) Berry was in fact, if not in name, the manager of the Pussycat Theater, where these films were consigned and where "Champagne Party" was shown; (3) the Pussycat Theater showed exclusively "X" rated movies to "adults only" patrons; (4) Berry ordered the films for the theater and instructed the projectionist which films to show; and (5) films from the same distributor had been sent to Berry at the Pussycat Theater for several years in containers similar to the one in which "Champagne Party" and "(X) The Club (X)" were received.

We believe this evidence to be more than sufficient to support the jury's determination that Berry had knowledge of the contents, nature and character of these films.

TAXATION OF COSTS

Appellant American Theater also contests the taxing of the cost of prosecution upon it under 28 U.S.C. §1918(b).[4] It asserts that the taxing of prosecution costs upon an unsuccessful criminal defendant impermissibly burdens a defendant's Fifth Amendment right not to plead guilty and its Sixth Amendment right to trial by facing it with an additional financial burden measured by the costs incurred by the prosecution in presenting its case which are then passed on to the defendant upon conviction.

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[4] 28 U.S.C. §1918(b) states:

> (b) Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution.

We find no merit to this contention. In our view, the government has the right to tax the cost of prosecution to an unsuccessful, non-indigent defendant in accordance with the provisions of 28 U.S.C. §1918(b) as long as it does so in a nondiscriminatory manner.

In this case, no claim is made by American Theater that it is indigent or that the costs here were not taxed in strict conformity with the statute.[5] Nor has it developed facts which would tend to show that it is a member of a class that is being invidiously discriminated against. The claim here is a much broader one, *i.e.*, that no costs can be taxed against an unsuccessful non-indigent criminal defendant.

The appellants cite no authority for this unique proposal. Our research has failed to develop any authority in support of it. Contrariwise, a number of state courts have upheld state statutes providing for the taxing of costs of

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[5] We note that the appellants failed to appear at the hearing before the District Court Clerk concerning the amount of costs taxed, and also failed to appeal the Clerk's decision to the trial court as is their right under Rule 54(d) of the Federal Rules of Civil Procedure.

prosecution against varied constitutional attacks.[6] Moreover, the Supreme Court, without discussing the precise issue raised here, has upheld an Oregon recoupment statute which includes a provision taxing a convicted defendant the expenses "specially incurred by the state in prosecuting the defendant" when it appears after trial that he has assets which may be reached. *Fuller v. Oregon*, 417 U.S. 40 (1974).

In holding that no constitutional deprivation has occurred, we note the concern that Congress has shown indigent defendants with the passage of the Criminal Justice Act of 1964, as amended, 18 U.S.C. §3006A, and the concern that the federal judiciary has shown these same defendants. See *Dennett v. Hogan*, 414 U.S. 12 (1973) (right of indigent defendants to appointed counsel on appeal); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (right of an indigent defendant to a free transcript); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in criminal cases).

Affirmed.

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[6] See *State v. Young*, 238 So.2d 589 (Fla.) *appeal dismissed*, 400 U.S. 962 (1970); *State v. Thomson*, 188 Kan. 171, 360 P.2d 871 (1961); *Kincaid v. Commonwealth*, 200 Va. 341, 105 S.E.2d 846 (1958); *Marquardt v. Fisher*, 135 Ore. 256, 295 P. 499 (1931); *Daniel v. Daniel*, 116 Wash. 82, 198 P. 728 (1921); *McKee v. State*, 142 Tenn. 173, 218 S.W. 233 (1920). But see *Ex Parte Coffelt*, 93 Okla. Crim. 343, 228 P.2d 199 (1951) (where the court reversed an order taxing costs as it found those monies were not used to defray prosecution expenses but were for a parole fund) and *Ex Parte Carson*, 143 Tex. Crim. 498, 159 S.W.2d 126 (1942) (where the court reversed an order taxing costs as it found the monies were used to maintain a law library).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No.75–1143 September Term, 1975

United States,
Appellee,
v.
Global Leasing, et al,
Appellants,

Appeal from the United States
District Court for the
District of Nebraska

For cause shown it is now here ordered that the Clerk of this Court is directed to file the untimely petition for rehearing tendered by counsel for appellants in this cause.

November 10, 1975

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 75–1143 September Term 1975

The United States,
Appellee,
v.
American Theatre Corporation, et al,
Appellants.

Appeal from the United States
District Court for the
District of Nebraska

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

December 12, 1975

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 75–1143

United States of America,
Appellee,

v.

American Theater Corporation
and Richard Ottis Berry,
Appellants.

Appeal from the United States
District Court for the
District of Nebraska.

Filed: December 12, 1975

ORDER DENYING PETITION FOR REHEARING EN BANC

The petition for rehearing en banc in the above case is denied by five of the judges voting in favor of the denial. Three of the judges vote in favor of the rehearing en banc.

Lay, Circuit Judge, joined by Bright and Henley would grant the petition for rehearing en banc for the following reasons:

We respectfully dissent from the denial of the rehearing en banc. The affirmance of the judgment of conviction in an "obscenity case" without an independent assessment by this court of the motion pictures involved is a serious abdication of judicial review.

As the Supreme Court stated in *Jacobellis v. Ohio*, 378 U.S. 184 (1964):

> [I]n "obscenity" cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.

378 U.S. at 190.

Once again we deal with the "dim and uncertain line" dividing protected expression from that which may properly be subjected to governmental restraint. The Supreme Court has cautioned that "sensitive tools" be used to carry out the "separation of legitimate from illegitimate speech". *Speiser v. Randall*, 357 U.S. 513, 525 (1958). In *Miller v. California*, 413 U.S. 15 (1973) complex guidelines were set forth and as an ultimate safeguard, all reviewing courts were required to undertake an independent review of obscenity decisions. Chief Justice Burger emphasized the necessity of independent review:

> If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

413 U.S. at 25.

In *Roth v. United States*, 354 U.S. 476, 487 (1957), the Court said the "sex and obscenity are not synonymous." The Supreme Court later explained that this required "[a] reviewing court . . . of necessity, [to] look at the context of the material, as well as its content." *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972).

In *Clicque v. United States*, 514 F.2d 923 (5th Cir. 1975), the defendant pleaded guilty to obscene writing. The Fifth Circuit reversed on the ground that the trial judge had an independent obligation to determine whether the material was constitutionally protected. The Court said:

> The rule that a guilty plea does not excuse the court from *reviewing the actual material* on which the plea is based applies with equal force to the district court judge as it does *to the appellate judge.* The rule requires an "independent assessment" of the facts before a conviction may be upheld in order to see whether the *material is constitutionally protected.*
>
> . . . .
>
> The requirement for the district court would seem to be the same as that for the appellate court. It must look at the materials and assess them according to the criteria given us by the Supreme Court.

514 F.2d at 927, 928 n.5 (emphasis added).

Much of the sexual conduct set forth in the stipulation finds its way into the best-selling books and popular movies of today. Unless one actually reads a book or views a motion picture the contextual use of the described conduct cannot be evaluated.

Under the obscenity guidelines defined in *Miller*, cautious exercise of judicial judgment is the ultimate safeguard of First Amendment freedoms. This court now

holds a stipulation describing the sexual content of movies to be conclusive proof that the movies are unprotected, "hardcore" pornography. In effect, we take judicial notice of the constitutional fact of obscenity. In doing so we break new and dangerous terrain. Our judgment at all times is indeed a fallible one. This is especially so when we exercise it without seeing or hearing the subject matter involved. I realize that this obligates us to view obscene and distasteful material. Yet whether this material is in fact obscene or whether it falls within what should be the jealously guarded protective cloak of the First Amendment we can know only after we look at the material itself. In this case, we will never know, for the court today insulates the jury's verdict from appellate review. More is required of us in the exercise of our power and responsibility of judicial review. As stated by Mr. Justice Brennan:

> It has been suggested that this is a task in which our Court need not involve itself. We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States, supra,* 354 U.S., at 497–498 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no "substitute for facing up to the tough individual problems of constitituional judgment involved in every obscenity case."

378 U.S. at 187-88.

We would require this court to review the film to pass upon the First Amendment issue. Our decision stands as an unwieldy and dangerous precedent.

A true copy.

Attest:

CLERK, UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.